Sri Damansara Sdn Bhd v Lim Ahat Kiat @ Lim Pei Tiam

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-11-130-1994
ABDUL KADIR MUSA J
27 MARCH 1997

***Contract** — Building contract — Factory — Late delivery — Vacant possession — What constitutes delivery — Agreed liquidated damages — Cut-off point for calculation — Architect's certificates — Whether necessary — Obligations of developer — Whether include the actual supply of water and electricity — Contracts Act 1950 s 38(1)*

The respondent was awarded a sum of RM15,855.15 together with the normal interest and costs by the learned magistrate for late delivery of a property pursuant to the sale and purchase agreement dated 13 April 1990 between the parties. The parties agreed that the only issue to be considered by the court in this appeal was what constituted delivery of vacant possession in respect of a factory. There was also no dispute that there was late delivery of vacant possession of the property and that being the consensus, the question that needed further deliberation by the court was, on the facts of this case, what should be the cut-off point for purposes of calculating the reasonable amount of damages that should justifiably be awarded to the respondent as a result of the appellant's breach.

Held, dismissing the appeal:

(1) There was nothing in the sale and purchase agreement to indicate that the performance of the appellant's obligation was dispensed with or excused. Instead, cl 7.1 of the sale and purchase agreement imposed on the appellant to provide the 'facilities' for the supplies of water and electricity but certainly not the actual supplies of the same which were not within the control of the appellant. Thus, the appellant was liable to pay to the respondent the agreed liquidated damages for late delivery calculated up to the date when both the water and electricity mains were actually installed to the respondent's factory. To hold otherwise would be contrary to the very core intention of cl 7.1 of the sale and purchase agreement (see pp 356I and 357A–G).

(2) In the absence of any evidence to show or suggest that there was any unreasonable delay on the part of the appellant to apply, and for the relevant authority to supply, the necessary mains, the silence about the same in the necessary 'Notice' to the respondent to take delivery of vacant possession and no evidence had been adduced to show when the respondent actually received the letter dated 11 November 1992, only cl 15.1 applied in so far as delivery of vacant possession was concerned. Thus, there was no justifiable reason to disturb the findings of the learned magistrate as to when vacant possession really took place (see p 358B–D).

(3) Examining the alleged 'architect's certificates' closer, there was no doubt that those documents were the certificates of the appellant's architect certifying that the said factory was ready for purposes of 'the delivery of vacant possession' (see p 355E).

[Bahasa Malaysia summary

Penentang diawardkan jumlah sebanyak RM15,855.15 bersama dengan faedah dan kos biasa oleh majistret yang bijaksana atas hantar-serah lewat harta menurut suatu perjanjian jual beli bertarikh 13 April 1990 di antara pihak-pihak. Pihak-pihak bersetuju bahawa satu-satunya isu untuk dipertimbangkan oleh mahkamah dalam rayuan ini adalah apa yang membentuk hantar-serah milikan kosong berkenaan dengan sebuah kilang. Juga tiada pertikaian bahawa terdapat kelewatan hantar-serah milikan kosong harta itu dan oleh yang demikian, persoalan yang memerlukan pertimbangan lanjut oleh mahkamah adalah, atas fakta kes ini, apakah harus menjadi titik potong bagi tujuan mengira amaun munasabah yang patut diawardkan secara adil kepada penentang akibat kemungkiran perayu.

Diputuskan, menolak rayuan:

(1) Tiada apa-apa dalam perjanjian jual beli tersebut yang menunjukkan bahawa pelaksanaan obligasi perayu dijalankan atau dimaafkan. Sebaliknya, fasal 7.1 perjanjian jual beli tersebut mengenakan kewajipan atas perayu untuk memperuntukkan 'kemudahan' bagi bekalan air dan elektrik tetapi bukannya bekalan sebenar yang sama yang tidak berada dalam kawalan perayu. Justeru itu, perayu bertanggungjawab membayar ganti rugi jumlah tertentu yang disetujui kepada penentang untuk hantar-serah lewat yang dikira sehingga tarikh apabila saluran utama kedua-dua air dan elektrik benar-benar dipasang di kilang penentang. Untuk memutuskan sebaliknya akan bertentangan dengan tujuan fasal 7.1 perjanjian jual beli tersebut (lihat ms 356I dan 357A–G).

(2) Dalam ketiadaan sebarang keterangan bagi menunjukkan atau mencadangkan bahawa terdapat kelewatan tidak munasabah pada pihak perayu untuk memasang, dan untuk pihak berkuasa yang relevan untuk membekal saluran utama yang dikehendaki, dan tiada keterangan tentang yang sama dalam 'Notis' kepada penentang untuk menerima hantar-serah milikan kosong dan tiada keterangan telah dikemukakan bagi menunjukkan penentang benar-benar telah menerima surat bertarikh 11 November 1992, cuma fasal 15.1 terpakai setakat mana hantar-serah milikan kosong adalah berkaitan. Justeru itu, tiada sebab yang wajar untuk mengganggu keputusan majistret mengenai bilakah milikan kosong benar-benar berlaku (lihat ms 358B–D).

(3) Memeriksa 'sijil arkitek' yang dikatakan dengan teliti, tiada keraguan bahawa dokumen-dokumen tersebut merupakan sijil arkitek perayu yang mengesahkan bahawa kilang yang dikatakan

sudah siap sedia untuk tujuan 'hantar-serah milikan kosong' (lihat ms 355E).]

Notes

For cases on building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1245–1337.

Cases referred to

Charles Muriel (f) v Newacres Sdn Bhd [1994] 2 AMR 1145 (refd)
Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188 (refd)
Loh Wai Lian v SEA Housing Corp Sdn Bhd [1987] 2 MLJ 1 (refd)
Salmah bte Sulaiman & Anor (Administratrices of the estate of Ahmad bin Ibrahim, deceased) v Metroplex Development Sdn Bhd [1997] 1 MLJ 369 (refd)
Sykt Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai [1988] 3 MLJ 221 (refd)

Legislation referred to

Contracts Act 1950 s 38(1)
Housing Developers (Control and Licensing) Act 1966

Appeal from: Summons No 72–6151–1993 (Magistrate's Court, Kuala Lumpur)

Vinayak Pradhan (*Skrine & Co*) for the appellant.
Abdullah Ngah (*Abdullah Ooi & Chan*) for the respondent.

Abdul Kadir Musa J: This is an appeal by Sri Damansara Sdn Bhd, the appellant/defendant ('the appellant') against the whole decision of the learned magistrate dated 11 October 1994 ordering the appellant to pay the plaintiff/respondent, Lim Ahat Kiat @ Lim Pei Tiam ('the respondent'), a sum of RM15,855.15 together with the normal interest and costs (p 1 encl 7 and p 20 encl 4). The said sum was awarded for *late* delivery arising from the sale and purchase agreement dated 13 April 1990 ('S & P') between the parties. There were 11 grounds of appeal ('the memo') (encl 2).

However, notwithstanding those 11 grounds, both parties at the inception of the hearing of this appeal agreed that, there is only *one* issue to be considered by the court. That issue is: '*what* constitutes delivery of vacant possession' in respect of a factory. In that context, both parties further agreed that, *if* vacant possession is *without* electricity and water supply, then the respondent has no case and the court below should not award any damages at all to him, otherwise, he has lawful claim against the appellant (notes of evidence p 5).

It is to be noted that there was *no* dispute that there was a late delivery of vacant possession of the said factory. That being the consensus of the parties, the question that needs further deliberation by the court is,

on the facts of this case, *what* should be the cut-off point for purposes of calculating the reasonable amount of damages that should and justifiably be awarded to the respondent as a result of the appellant's breach. For that purpose, cll 7 and 15 of the S & P are most relevant. The former, which deals with 'Construction of Infrastructure' was invoked by Dato' Abdullah Ngah, learned counsel for the respondent, while the latter was heavily relied upon by En Pradhan, learned counsel for the appellant. Clause 15 deals with 'Delivery of Vacant Possession'. I will next endeavour to examine both the said clauses in greater depth.

Clause 15.1 of the S & P provides:

> 15.1 Subject to any extension or extensions of time as may be allowed by the architect and provided that the purchaser shall have paid to the vendor all instalments of the purchase price and any other sums under this agreement as and when due and payable, the said property, without any alterations and / or additions to *the said building, shall be completed and be ready for delivery within 24 months from the date hereof. In the event that the vendor shall delay completion of the said building and the delivery of vacant possession of the said property to the purchaser beyond the aforesaid period the vendor shall pay to the purchaser agreed damages calculated from day to day at the rate of 10% pa* on the purchase price of the said property *from such aforesaid date to the date of actual or deemed delivery of vacant possession* of the said property to the purchaser as hereinafter provided. (Emphasis added).

Thus, from cl 15.1 of the S & P, it is required of the appellant to *complete and delivery vacant possession* of the three relevant units of the factory *within 24 months from the date of signing the said S & P* dated 13 April 1990. Hence, unless such period was extended by the vendor's architect, the relevant premises *must* be completed *and* vacant possession delivered *by* the vendor to the purchaser *on or before 12 April 1992*, provided the purchaser fulfilled all his obligations required of him by cl 15.1. If those conditions were fulfilled by the purchaser, but the vendor did not or could not deliver vacant possession to him, then the former will be entitled to claim the agreed damages at the rate of 10%pa calculated on a daily basis *from* the date of such failure till actual or deemed delivery took place. What constitutes 'actual or deemed delivery of vacant possession' is provided by cl 15.2 of the S & P.

Clause 15.2 provides:

> 15.2 Upon the issuance by the vendor's architect of a certificate certifying that the construction of the said building has been practically completed in accordance thereof and provided the purchaser shall have observed and performed the terms and covenants on his part herein contained to be observed, the vendor shall let the purchaser into possession of the said property provided that such possession shall not give the purchaser the right to occupy the said property until such time as the certificate of fitness for occupation is issued by the appropriate authorities. Upon the expiry of 14 days from date of a notice in writing from the vendor informing the purchaser to take delivery of the said property (notwithstanding that the

purchaser may not in fact have taken possession or occupation of the said property), the purchaser shall be deemed to have taken vacant possession of the said property and/or to the fixtures and fittings thereon.

Thus, by the aforesaid cl 15.2, it was argued by En Pradhan that, upon the issuance a certificate by the vendor's architect certifying that the construction of the factory has been *practically completed in accordance with terms of the S & P* and the purchase has fulfilled *all* his obligations thereunder, it would be incumbent upon the appellant to let the respondent into possession of the factory. It was further argued by him that, upon the expiry of *14 days* from the date of the appellant giving such notice in writing to the respondent, informing him to take delivery of the said factory, the respondent shall be *deemed* to have taken possession of the same *irrespective* of whether or not, in fact, he has actually took physical possession of the said factory. As such, it was argued that, as from that day onward, the appellant should be exonerated from any liability for any loss or damage flowing therefrom. On that basis, it was thus contended by Mr Pradhan that, on the facts of this case, delivery of vacant possession took effect 14 days *after* 9 May 1992, that is as from 23 May 1992.

However, it is also provided by the said cl 15.2 that such possession does *not* give the respondent the right to occupy the said factory until the certificate of fitness for occupation is issued by the appropriate authorities. What surfaces from that are the issues of:

(i) delivery of vacant possession; and

(ii) right to occupy the said factory.

Of the two, I can safely infer that (ii) above is not a contentious issue and need no further deliberation by me. The focal point of the submissions by both the learned counsels is the issue of 'delivery of vacant possession'. Any delay in doing so *by* the appellant entitled the respondent to claim agreed damages for every day of such delay at the rate of 10%pa on the purchase price of the said factory. On the facts of this case, it was his contention that, vacant possession took effect 14 days *after* 9 May 1992 as evidenced by the appellant's letters exhibited at pp 61–64 of encl 4. *That date is 23 May 1992*; thereafter, the respondent will be entitled to claim agreed damages as mentioned earlier.

According to En Pradhan, those three letters amounted to '*notice in writing*' by the appellant to the respondent informing him to take delivery of vacant possession of the said factory as contemplated by cl 15.2 of the S & P. Those letters were accompanied with the necessary certificates issued by the appellant's architect '... certifying that the construction of the said [factory] has been practically completed ...' as required by cl 15.2 of the same. Thus, it follows that the *damages entitlement available to the respondent should only be limited to 23 May 1992*, which is, 14 days *after* the 9 May 1992 letters referred to earlier.

The basis of his such contention was platformed on the pleadings of the respondent itself which was based on the terms of the S & P, and not

the time when the respondent was *actually* being supplied with water and electricity supplies as concluded by the learned magistrate (ie 11 November 1992). He argued that it was wrong for the learned magistrate to have applied housing laws to any sale and purchase agreement involving factory premises as in this case. He therefore submitted that her reliance on the cases of *Sykt Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221 and *Charles Muriel (f) v Newacres Sdn Bhd* [1994] 2 AMR 1145, was certainly a misapplication of an appropriate law. Instead, he contended that, the nearest case that can be relied on and could have been applicable to the factual situation of this appeal is the case of *Salmah bte Sulaiman & Anor (Administratrices of the estate of Ahmad bin Ibrahim, deceased) v Metroplex Development Sdn Bhd* [1997] 1 MLJ 369 where it was held that the developer's obligation under the relevant sale and purchase agreement includes the connection of electricity and water mains outside *to* the internal electricity and water mains and *not* the flow of water and electricity as contended by the learned counsel for the respondent.

Dato' Abdullah on the other hand strongly contended that one of the appellant's obligations under the S & P is to supply water and electricity under cl 7.1 of the same since the said clause is certainly part and parcel of the S & P. Clause 7.1 which deals with 'Construction of Infrastructure' stipulates:

> 7.1 The vendor shall at its own cost and expense construct or cause to be constructed ... water main ... . The vendor shall also at its own cost and expense provide for the supply of water, ... and facilities for the supply of electrical power sufficient for normal lighting only to the switchbox of the said building provided however that the purchaser shall be liable for and pay all deposits and turning on fees for the supply of electricity and water to the said building including the cost of the water and electricity meter and internal wiring and other electrical installations,

which requires the appellant to provide the necessary facilities in respect of water and electricity supplies for *normal* usage expected of a factory. Failure to do so according to him, one cannot construe that the said factory 'has been practically completed' within the intention of cl 15.1 of the S & P. As such, unless extended by the appellant's architect, *the 24 months period referred to in the said cl 15.1 should therefore be calculated from the date of signing the S & P* (ie 13 April 1990) till actual delivery of vacant possession, or such delivery of vacant possession *is deemed to take effect by virtue of cl 15.2* of the S & P. Whichever is applicable, it was strong contention that, when such event took place, the said factory must be equipped with the necessary facilities for the supplies of water and electricity. He summarized his submission in that context that, a 'factory without water and electricity is not a factory at all.'.

On the above note, it was his contention that all the cases referred to and relied on by the learned magistrate as guidance to similar factual situation involving factories, should not be held to be wrong. Thus, her conclusion that delivery of vacant possession within the ambit of the S & P *effectively took place on 11 November 1992* (encl 4 pp 18 & 19), and *not 14 days after the 9 May 1992 letters* as contended by En Pradhan, must

therefore be held to be right, *both in law and in fact*. There was no such extension envisaged by cl 15.1 of the S & P ever been adduced.

To strengthen his argument, Dato' Abdullah further canvassed that there was no certificate of the appellant's architect ever been issued at all as required by cl 15.2 of the S & P. The alleged 'architect's certificates' attached to the letters of 9 May 1992 and exhibited at pp 62A, 64A and 66A of the notes of evidence were *not* the necessary certificates as envisaged by the said clause. They made *no* mention as to the completion of the factory, but served only to inform the respondent that, upon taking delivery of vacant possession, he has to settle the balance of RM7,419.40 with 14 days from 9 May 1992 as required by s 3 of the second schedule to the S & P (p 55 notes of evidence). With the greatest of respect to him, I could not agree with such a submission for reasons, inter alia, as stated below.

Firstly, if one is to examine closer to those said documents (ie at pp 62A, 64A and 66A of the notes of evidence), the second paragraph of each one of them clearly states that:

> We hereby certify that the following stages of work [ie BO 41-1-001 to BO 41-1-109 (DESIGN 1&2) *which make it possible for delivery of vacant possession to take place*] have been completed as at May 1992. (Emphasis added.)

At the bottom of the same, it was signed by Foong Yee Tuck of the 'FT AKITEK'. There was no dispute that FT AKITEK was the appellant's architect for purposes of cl 15.2 of the S & P. Thus, from that, it is without doubt in my mind that, those documents are the certificates of the appellant's architect certifying that the said factory was ready for purposes of the 'delivery of vacant possession' as on 4 May 1992, since *all* work up to that stage 'have been completed' on that date.

However, by s 3 of the second schedule to the S & P, upon such delivery, it is required of the respondent to pay RM7,419.40 for each unit bought by him in the manner stipulated in cl 3.3 of the S & P (p 28 notes of evidence). According to the said cl 3.3, that amount must be paid by the respondent to the appellant within 14 days from the date of the notice in writing from the appellant to pay. That request or demand was made on 9 May 1992 as evidenced in para 4 of each of those three letters.

Secondly, the seventh paragraph of all those three letters state, inter alia, the following:

> Pursuant to cl 18 of the [S & P], the developer's defective liability period is for six months after the date of delivery of vacant possession of the buildings.

That 'defective liability period' is in consonant with cl 18.1 of the S & P (p 41 notes of evidence) and is required by the said clause in connection with the 'delivery of vacant possession' or 'deemed delivery' of the same referred to in cl 15.2 of the S & P.

On the above premises, I therefore hold that those three letters dated 9 May 1992 are letters giving the required notice to the respondent to take delivery of vacant possession in accordance with cl 15 of the S & P, and not as contended by Dato' Abdullah. I also hold that the documents attached to those letters as exhibited at pp 62A and 66A of the notes of

evidence, are, in fact, the necessary 'architect's certificates' referred to by cl 15.2 of the S & P for the purposes of 'delivery of vacant possession' discussed earlier.

In the case of *Insun Development Sdn Bhd v Azali Bin Bakar* [1996] 2 MLJ 188 decided on 11 May 1996, the Federal Court discussed at length the effect of cl 17 in relation to a written contract dated and executed on 18 March 1974 for a purchase of a shophouse to be constructed by a licensed housing developer in the case of *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1. The said cl 17, in essence, is identical to cl 15 of the S & P in the present case.

From my close analysis of both cl 17 in *Loh*'s case and cl 15 of the S & P in this appeal reveals that they both provide a formula for computation of the agreed liquidated damages which defined *not* only its terminus a quo (its opening date) *but* also its terminus ad quem (its closing date). In both instances, the premises involved were *not* residential premises which are normally governed by the Housing Developers (Control And Licensing) Act 1966 ('the 1966 Act'), *but* nevertheless the 1966 Act was the law applicable in the aforesaid *Loh*'s case. Thus, by implication and analogy, I therefore conclude that, in the present appeal, the same law would equally be applicable, in the absence of specific words to the contrary, based on their similarities, both in form and in effect, of those two clauses.

In *Loh*'s case, Lord Oliver of Aylmerton (delivering the judgment of the Board) at p 3 said as follows:

> It is of course beyond doubt that the failure to complete the building on the stipulated date was a breach of contract, but ... [the] determinative [factor or calculating the damages under the contract Agreement] ... imposed on the developer the obligation to indemnify the purchaser for any delay in delivery of possession ... .

At p 4 of that case, his Lordship further said:

> The clause has to be reasonably and sensibly construed. The obligation is introduced by the words '*the vendor shall pay*' and there follows the calculation of the sum which he is to pay carefully defined by its opening and closing date. (Emphasis added.)

In cl 15.1 of the S & P, the words ' ... *the vendor shall pay*' to the purchaser incorporated thereto was also followed by a well defined calculation as that found in *Loh*'s case. As such, my conclusion is that the same principle would apply to the present appeal. In that respect, I would not be out of place to quote s 38(1) of the Contracts Act 1950 ('the 1950 Act'), which states as follows:

> 38 Obligation of parties to contracts
>
> (1) The parties to a contract must ... perform ... their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.

The word '*obligation*' is found in all the instances quoted above. The performance of that 'obligation' referred to *can only be exonerated if it is dispensed with or*

A *excused* under the 1950 Act or of any other law such as the 1966 Act. Viewing the S & P microscopically, I failed to find such 'dispensation' or 'excuse'. Instead, the S & P imposes on the appellant to provide:

(i) the *facilities* to the supply of water; *and*

B (ii) the *facilities* for the supply of electrical power sufficient for normal lighting only to the switchbox of the said building,

under cl 7.1 of the same.

Clause 7.1 speaks of providing the 'facilities' for the supplies of water and electricity, but certainly *not* the *actual supplies* of the same which are C not within the control of the appellant. In that context, I share and subscribe fully to the decision of Siti Norma Yaakob J (as she then was) in the case of *Salmah bte Sulaiman & Anor v Metroplex Development Sdn Bhd* [1994] 3 AMR 2514. In *Salmah*'s case, at pp 2516–2517, her Lordship held that:

D > Clause 18 of the agreement also *exempts the respondent from liability for late delivery where such delay is caused by the relevant authorities in supplying water and electricity. ... the respondent's obligation is only to connect the outside electricity and water mains to the internal electricity water mains and not to the flow of water and electricity. ...*
>
> The fact that water and water and electricity were supplied very much E later is due very much to the delay of the relevant authorities, for which the respondent cannot be faulted and for which they had been exempted by cl 18 of the agreement. (Emphasis added).

Upon close scrutiny of her Lordship's judgment, there is no doubt in my mind that cl 18 of the said case, in all material particulars, is identical to F cl 15.1 of the S & P. Thus, on that score, I conclude that the appellant is therefore liable to pay to the respondent the agreed liquidated damages for late delivery calculated *up to* the date when both the water and electricity mains were actually installed to the respondent's factory, and *not* to the date when the said factory was being actually supplied with *the flow* of water and electricity. To hold otherwise would be most unfair to the G appellant and is certainly, in my humble view, contrary to the very core intention of cl 7.1 of the S & P.

Having said that, I also note that in *Salmah*'s case, it can be inferred that, there was no evidence to show that the vendor had unreasonably delayed in applying to the relevant authorities to have both the water and H electricity mains installed to the premises in question; thus her Lordship's decision as quoted earlier. Likewise, in the present appeal, the same picture is painted upon close scrutiny to encl 4 and all relevant facts of the case. To do otherwise, in the absence of any cogent evidence to that effect, would amount to pure speculation on my part.

I However, in the present appeal, the 'Notice' dated 9 May 1992 enclosing the relevant 'architect's sertificates' (pp 61–66 encl 4) made no mention that the water main and or the electricity main has been installed or has been applied by the appellant to have them installed to the said

factory. The only piece of useful evidence available is at p 67 of encl 4, whereby the respondent was informed that both the water and electricity meters have been installed. That letter is dated 11 November 1992 and that was the date the learned magistrate (at p 18 encl 4) treated it as terminus ad quem for the purpose of calculating the liquidated damages in line with *Loh*'s and *Salmah*'s cases.

On the premise of the above discussion, and: (i) in the absence of any evidence to show or suggest that there was any unreasonable delay on the part of the appellant to apply, and for the relevant authorities to supply, the necessary mains; (ii) the silence about the same in the necessary 'Notice' to the respondent to take delivery of vacant possession; and (iii) no evidence has been adduced to show when the respondent actually received the letter dated 11 November 1992, I conclude that, only cl 15.1 applies in the present appeal in so far as delivery of vacant possession is concerned. Thus, there is no justifiable reason for me to disturb the findings of the learned magistrate as to when vacant possession really took place. That being the only issue both parties agreed required me to determine, I therefore dismiss this appeal with costs. The decision of the court below is hereby upheld.

Appeal dismissed.

Reported by Jamalul Hisham